

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1442

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM F. HASENSTAB.

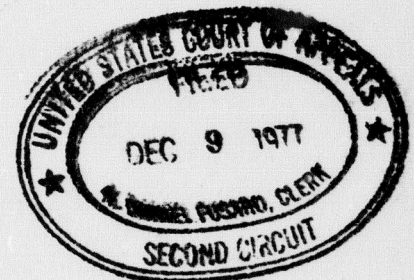
Appellant.

*Appeal of Hasenstab from the Judgment of Sentence of the
United States District Court for the Southern District of
New York, at Criminal No. 77-509.*

BRIEF OF APPELLANT, WILLIAM E. HASENSTAB

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STATEMENT OF THE COURT'S
JURISDICTION

The Court's jurisdiction is based upon 28 U.S.C. §1291 and is predicated upon the determination of a jury sitting in New York City in the Southern District of New York ended August 26, 1977, date finding appellant WILLIAM HASENSTAB guilty of offenses detailed below and a judgment of commitment for the appellant filed October 5, 1977. The certified Record of these proceedings has been filed with this court.

A. STATEMENT OF ISSUES PRESENTED
FOR REVIEW

1. Whether the mailings of invoices and purchase orders, if established, and checks in payment for goods sold and delivered by TABULATING FORMS INC., to PAN AMERICAN AIRWAYS bears any legal proximity to the conduct which forms the basis for the alleged fraud.

2. Whether the use of the telephone in the course of the business activities of TABULATING FORMS INC., and PAN AMERICAN AIRWAYS, to the extent indicated in the trial transcript, bears any legal proximity to the conduct which forms the basis of the alleged fraud.

3. Whether the conspiracy count of the indictment must be dismissed if reversal is mandated in reference to either the first or second counts of the indictment.

4. Whether the Court committed reversible error in its instruction to the jury.

5. Whether the Court below committed substantial prejudicial error requiring reversal of the conviction by permitting the Government to introduce:

(a.) Evidence of corrupt transactions by its key witness, GEORGE BARNEY, with other persons not relevant to the indictment.

(b.) Evidence of alleged venal character of the accused although he did not testify in his own behalf.

B. STATEMENT OF THE CASE

On July 5, 1977, the Grand Jury in and for the Southern District of New York presented an indictment charging the defendant, WILLIAM HASENSTAB, with a violation of three counts. Count One charged the defendant with a violation of the Mail Fraud Statute, 18 U.S. 1341 and 2. The Second Count based upon an incorporation by reference alleged a violation of the Wire Fraud Statute, 18 U.S.C. 1343 and 2. The Third Count alleged a violation of the Conspiracy law, 18 U.S.C. 371, alleging the defendant to have conspired with one, Barney, to violate the Mail and Wire Fraud Statutes. Each of the foregoing statutory violations charged alleged the objective of defrauding the defendant's employer, Pan American Airways out of the sum of approximately \$45,000.

On August 22, 1977, the Hon. Robert Ward, sitting in for the United States District Court of the Southern District of New York, the Trial Judge in the case at bar, in response to various motions requesting further particulars denied the application and set the case down for trial.

The trial commenced on the 23rd day of August, 1977. At the close of the Government's case, the defendant moved for Judgment of Acquittal, which motion was denied. One witness was offered by the defendant, after which defendant rested.

Following a conference, Judge Ward charged the Jury and submitted to it for deliberation the three counts to the indictment.

The Jury rendered a verdict on the same date, finding the defendant guilty on all counts of the indictment.

On the 5th day of October ,1977, defendant's motion to set aside the verdict and for a new trial was denied. The defendant was sentenced on the First Count of the indictment to a period of confinement for six (6) months, on the Second Count of the indictment to a sentence of probation for two (2) years, and on the Third Count of the indictment, Conspiracy, to pay a fine in the sum of \$7,500, which fine has been paid. Sentences on all counts were to run concurrently.

Notice of Appeal was timely filed. The appellant was released on bond pending appeal.

This Brief is filed on behalf of appellant, WILLIAM HASENSTAB.

c. STATEMENT OF FACTS

Pan American World Airlines, frequently referred to as Pan Am, is a corporation the existence of which is well-known to this Court. During the relevant dates of the indictment, Pan Am maintained its facilities in various locations including a purchasing department at Kennedy International Airport (71), one of the components of which was Unit 5, designated as the Office and Passenger Service Support Unit (72).

That unit, charged with the purchase of paper products, office supplies and equipment, was staffed by personnel overseen by Mr. WALTER O'TOOLE, the unit manager. Under him was the defendant, WILLIAM HASENSTAB, as the supervisor, eleven (11) buyers, one (1) expediter and one (1) order clerk (73). One of the paper goods commonly purchased by Unit 5 were printed forms of varying types.

The manager of the purchasing unit, Mr. O'TOOLE, testified as a witness for the Government, that his unit functioned as follows: the consuming units of Pan Am from various locations would send to Unit 5 Requisitions for supplies in multiple copy form. Mr. O'TOOLE, the unit manager, "reviewed" (74) these Requisitions, all generated from these user departments. The Requisitions were then referred to the buyer, Mr. NICK DINAPOLI, who then reallocated the Requisitions to the other individual buyers who purchased the commodities (74).

The buyers functioned to secure pricing, supply, selection of vendor etc., completed the Requisition form containing the necessary purchase information (75) and turned the completed Requisition form over to the supervisor, defendant HASENSTAB, for review. Defendant HASENSTAB, the supervisor, apparently was charged with review of the Requisitions to determine whether the buyer had accurately completed the form in accordance with the user departments' requirements as set forth in its' Requisition. (77-80) According to O'TOOLE, the buyer had the responsibility to indicate on the Requisition the purchase price for the goods, although the Requisition forms generated by the user departments on certain occasions came into Unit 5 with the price already on the document, such price based on past experience, or selected from catalogs or published listings. (81)

Mr. DiNAPOLI was the buyer who specialized in printed forms, the subject of this indictment. According to O'TOOLE, after the Requisition forms were completed, defendant, HASENSTAB, was to review them to the extent indicated, however, the proofs do not bear out such exclusivity of review by Mr. HASENSTAB.

DiNAPOLI testified on behalf of the Government to the nature of his duties (285) that in respect to the printed forms concerned, the buyer, after securing price quotations, would cause the purchase order to be written (287), after which the

Requisition forms would be sent to the supervisor (defendant HASENSTAB) who would refer the forms on for further processing (288). DiNAPOLI further testified concerning paper goods ordered from a company called TABULATING FORMS, INC., in respect to which the defendant HASENSTAB was alleged by the indictment, and through the proofs, to have maintained a corrupt arrangement. DiNAPOLI indicated that during the four to five years preceding his testimony the practice outlined above was not followed in all instances. (288) That by "approximate estimate" (295) not supported by his examination of company records, in reference to fifty to sixty per cent of the orders from TABULATING which he, DiNAPOLI, had placed, he, DiNAPOLI, was given the prices for the goods concerned by Mr. HASENSTAB rather than having secured the prices for such goods himself. (296) In the remaining forty per cent of the orders to TABULATING that DiNAPOLI handled, the prices were directly obtained by DiNAPOLI, on quotations that he solicited personally. DiNAPOLI stated he did not indicate on any of these Requisition forms that the pricing was given to him by Mr. HASENSTAB or that HASENSTAB selected TABULATING as the vendor. (303) Apparently, the other buyers in the unit ordered the balance of the goods from the same company, TABULATING, in the normal course of their duties. (302) Mr. DiNAPOLI apparently assigned a certain number of Requisitions, during the period concerned, relating to goods ultimately

ordered from TABULATING, to himself for processing as the buyer. (167, 168, 174, 175). An analysis of substantially all of the goods ordered from TABULATING during the period concerned in terms of the designated buyers is set forth below.¹

TABULATING also received orders upon the recommendation of one SOL WELGER, supervisor of a Pan Am user department in Rockleigh, New Jersey, to the extent of five to ten per cent of that department's orders, according to GEORGE BARNEY, TABULATING'S President, who had bestowed some gifts upon WELGER including a 1975 Cadillac (425). O'TOOLE also testified that the Pan American purchase orders were sent out through the mail (268) or by telephone (262) although the record is barren of proof as to any such specific mailing or telephone call. None of the Pan American Requisitions were identified by Mr. DINAPOLI or any other witness as containing a designation or selection by defendant HASENSTAB of TABULATING as the chosen vendor of goods.

Mr. GEORGE BARNEY, testifying on behalf of the Government that he was a principal proprietor of TABULATING FORMS, a paper forms supplier, stated that in the 1950's, Pan Am was a TABULATING customer (314, 315) and that for goods furnished to Pan Am, he would receive by mail checks in payment thereof. BARNEY also testified that Government's Exhibit "7" represented

¹/ The Transaction Analysis is in chart form appended to this Statement of Facts.

cancelled checks sent to his company (316, 317) through the mail for the years 1972 through 1976. He stated, further, that he knew Mr. HASENSTAB, the defendant, having met him in 1968 in HASENSTAB'S capacity as a Pan Am buyer. Over objection, BARNEY was then allowed to testify (322) to conversations with defendant HASENSTAB in 1968, the substance of which was that he told HASENSTAB that he, BARNEY, at that time, appreciated Pan Am business, that he attempted to give gifts to defendant HASENSTAB, who stated that he wasn't interested in gifts (322) but in money (323). After the conversation, BARNEY testified, he gave defendant small sums of money, Fifty (\$50.00) Dollars or One Hundred (\$100.00) Dollars, (322) until the end of the year 1970 when a strike, coupled with apparent difficult financial conditions, prevented BARNEY from taking any new orders, but during which period of time, he shipped goods to Pan Am on old orders from merchandise then in inventory. (328) In 1972, BARNEY informed defendant that his company was again financially able to carry Pan Am's business (329) and that he was prepared to "do a pay-off" on a regular basis. The defendant was said to have stated that he only wanted what BARNEY thought he was worth. BARNEY at some point, he further testified, told HASENSTAB that he, BARNEY, would pay HASENSTAB five per cent of his sales (330). Starting in 1972, BARNEY alleged, to have given defendant undefined sums of money reaching a monthly payment in 1976 of Two Thousand (\$2,000.00)

Dollars per month. His company's business increased each year. He alleged that at varying times he discussed with HASENSTAB the pricing and ordering of goods but stated that he did not learn from HASENSTAB his competitor's price. (333) Over objection (339, 340), the witness was allowed to testify to a pay-off to a competitor apparently to keep him from complaining about the receipt by TABULATING of orders from Pan Am. The conversation and transaction testified to had been out of the presence and without the apparent knowledge of the defendant HASENSTAB.

BARNEY further testified over objection (340) that HASENSTAB sent him blank receipts from a restaurant for the purpose of completing the same in order for BARNEY to substantiate business expense deductions he needed for substantiation of deductions on his IRS tax audit (353). In 1975 BARNEY drew checks on his company's funds, cashed them, and in that manner he stated he paid the defendant (351). The witness, on direct examination, also stated, over objection (339), that he was involved in a multitude of "kick-backs" and pay-offs with other companies with which his firm did business (357) and that he was awaiting sentence after a guilty plea in the Southern District to two counts of an indictment, and that he was then a cooperating witness for the Government (363). The witness also testified to two tape recorded conversations incriminating defendant (365). BARNEY also indicated in his

testimony that a Pan Am employee was the recipient from him of three automobiles including a 1975 Cadillac, of the use of a credit card, and of other gifts for reasons of "friendship" (425) and apparently, for the designation by this employee, SOL WELGER, of TABULATING as a vendor to Pan Am. Between 1974 and 1975 BARNEY believed that his business with Pan Am had doubled (430) and that the user department headed by SOL WELGER in Rockleigh, New Jersey ordered a substantial quantity of paper in 1974 and 1975. BARNEY also believed that Mr. WELGER made up the necessary Requisitions and recommended his company as vendor in five to ten per cent of the orders placed by that department (431).

GEORGE KASSAB, on behalf of the Government, testified that he was an auditor for Pan Am and that his company records showed payments to TABULATING varied from the year 1968 in the amount of Fifty-eight Thousand Nine Hundred Sixty-three (\$58,963.00) Dollars to the sum of Four Hundred Ninety-eight Thousand Six Hundred Fifty-nine (\$498,659.00) Dollars in the year 1976.

After some "flushing", KASSAB also testified that his computer print-outs, the basis of his testimony, indicated that business done with Moore Business Forms increased from 1968 to a high of over One-Half Million Dollars in 1975. (498)

The Government then rested. (502) Defendant's motion for Judgment of Acquittal was denied. (510)

Defendant then called, under subpoena, one SOL WELGER, employee of Pan American, who was then advised of his Fifth Amendment Privilege rights by the Court, (518) and who ultimately, on a number of occasions, invoked his privilege. He did so invoke his privilege to the question (547):

"Q. Did you in fact, over the years recommend Tabulating Stock Forms, Inc. as a vendor to Pan American?" . . .

"Q. If I were to ask you like questions, Mr. Welger, concerning your performance of your duties and any relationship that you might have had with Mr. Barney relating to his company's transactions with Pan American, would your answer be the same; that is, would you invoke the Fifth Amendment privilege?"

MR. ISENBERG: The client will invoke the Fifth Amendment privilege."

Contrary to Mr. BARNEY'S testimony, Mr. WELGER denied (563) recommending BARNEY'S company as a designated vendor (568). In reference to a question put to Mr. WELGER (560) upon which he invoked his privilege, the Court then intervened (561), expressing an attitude to the witness and his attorney and to the jury which the Court then attempted to cover up (562), ultimately leading the attorney for the witness to withdraw his objection based upon the Fifth Amendment Privilege previously announced in respect to the question concerned. (563, 564)

The defendant then rested.

POINT I

- A. THE GOVERNMENT FAILED TO ESTABLISH THAT THE USE OF THE MAILS WAS SUFFICIENTLY RELATED TO THE ILLEGAL CONDUCT ALLEGED IN THE INDICTMENT TO MERIT CONVICTION UNDER 18 U.S.C. § 1341.²

COUNT ONE of the indictment charges the Appellant with use of the mails in violation of 18 U.S.C. § 1341.³ The indictment charges that the Defendant-Appellant, WILLIAM E. HASENSTAB, devised a scheme and artifice to defraud Pan American World Airways, Inc., and its shareholders, officers and directors, of his honest and faithful services as their employee and of more than Forty-five Thousand (\$45,000.00) Dollars of their money and property by means of false and fraudulent pretenses, representations and promises and for the purpose of executing such scheme and artifice and attempting so to do, did place and cause to be placed in post offices

^{2/} Defendant was also convicted under Count Two of the indictment of a violation of 18 U.S.C. § 1343 and 2 with wire fraud through the use of a telephone. The basic proofs applicable to the alleged violation were incorporated by reference in the indictment from Count One and assertedly differed only as to the alleged use of the telephone as the instrumentality in place and stead of the U. S. Mails. The failure of proofs will be analyzed infra.

^{3/} 18 U.S.C. § 1341 reads in pertinent part as follows: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whether to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered thereon, or at the place at which it is to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000.00 or imprisoned not more than five (5) years, or both. 18 U.S.C. 1341"

and authorized depositories for mail matter and did cause to be delivered by mail according to the direction thereon certain mail matter to be sent and delivered by the United States Postal Service. (645-46)

The use of the mails, principally relied upon by the Government to establish the mail fraud alleged in COUNT ONE are mailings that were allegedly sent in the form of checks (Government Exhibit "7") from Pan Am to TABULATING FORMS in payment for goods sold and delivered. (316) Additionally, invoices from TABULATING to Pan Am were claimed to have been sent in the mail upon which Pan Am later made payment to TABULATING for the goods sold and delivered. (316) Finally, testimony adduced by the Government indicated that mailing of purchase orders from Pan Am to TABULATING in the ordinary course of business of both companies had taken place. (268)

No invoices or purchase orders, mailed or not mailed, were introduced into evidence and none were specifically referred to or identified in the testimony.

This procedure had been a regular ongoing procedure, apparently established long before Mr. HASENSTAB, the Appellant, was associated with Pan Am. The process was not altered throughout the course of the alleged conspiracy, and Appellant did not seek to alter the practice. Appellant had no power to control these mailings, nor did he seek to exercise any control over them. In short, the mailings occurred without any spec-

ific instruction or conscious effort on the part of Appellant.

The Government, throughout the trial, did not claim that the mailings introduced into evidence, the cancelled checks in payment for goods sold and delivered, (Exhibit "7"), performed any purpose in the execution of the alleged fraud, except, in it's summation, the Government argued that HASENSTAB was able to be paid by BARNEY, his co-conspirator, because payment for the goods shipped to Pan American was by mail (Government's Exhibit "7"), thus making BARNEY financially able to pay Defendant. The sole reference to payment of HASENSTAB by BARNEY, other than by cash having no identifiable source, appears in the Trial Record on page 351 in direct examination:

"Q. At that time, that is in 1975, how did you obtain the money to pay Mr. Hasenstab?

A. I drew checks out of the company.

Q. I'm sorry, you drew?

A. Checks.

Q. From where?

A. The company, the company.

Q. Who were they payable to?

A. Me.

Q. What would you do with them?

A. Cash them or have them cashed."

The Trial Record fails to reveal any claim by the Government that either the mailings of the purchase orders or invoices or checks in payment of the goods sold and delivered,

acted as any signal in respect to the cash payments alleged to have been made by BARNEY to Defendant HASENSTAB. Nor does the Trial Record reveal any claim by the Government that any of the mailings were related to inventory control or to any computation of monies alleged to have been paid to Defendant HASENSTAB; nor did the proofs indicate that any of the checks mailed to BARNEY by Pan Am were, by time schedule or otherwise, related to the payments alleged to have been made. There was no testimony by BARNEY that his prices quoted to Pan Am for goods purchased by that company were, in any way, affected by the contributions to HASENSTAB or that had he not made the payments that the prices quoted to Pan Am would have been any less.

A review of the evidence adduced at trial and an analysis of the applicable legal principles clearly establish that neither the checks (Government's Exhibit "7"), the invoices, or purchase orders served any purpose in relation to the basis of the fraud claimed to be against Pan Am. Therefore, there was insufficient evidence, as a matter of law, to sustain the Mail Fraud conviction. Moreover, in view of the testimony of BARNEY (330, 332, 449) it would appear that he paid HASENSTAB, based upon the gross amount of the sales to Pan Am without any accounting to HASENSTAB or going over any records with HASENSTAB and notwithstanding the lack of proof in the Trial Record that HASENSTAB had exercised any influen-

tial discretion affecting or on behalf of TABULATING. Lastly, the amounts paid were determined by BARNEY (329-330) not HASENSTAB, and as the Trial Record reveals, paid by him under the erroneous assumption that all of the Pan Am business his concern was awarded was through the efforts of HASENSTAB.

B. THE MAILING OF THE INVOICES, PURCHASE ORDERS OR CHECKS IS REMOTE FROM AND HAS NO LEGAL RELATION TO THE BASIS OF THE FRAUD ALLEGEDLY PERPETRATED AGAINST PAN AMERICAN.

Assuming, arguendo, that the mailing of the checks was important in that payment to TABULATING by Pan Am ultimately provided TABULATING with the financial wherewithal to secure from it's bank account cash to pay Defendant HASENSTAB, the mailings still do not constitute such fraud within the meaning of 18 U.S.C. §1341. This is so, because the payment for the goods was an innocent act in and of itself representing the legitimate business transaction. The fraud which allegedly occurred was not proximately related to the sale of the goods by TABULATING to Pan Am. Rather, it was the subsequent receipt of cash by HASENSTAB and his failure to report the receipt of such monies that constituted the fraud and disloyalty.

The alleged fraud took root after HASENSTAB received the funds and failed then to tell his employer of such receipt. That was the dishonesty.

The facts at bar are distinguishable from United

States v. Brycza, 522 F.2d 414, and United States v. George, 477 F.2d 508, where the payments made were accomplished through the medium of setting up a dummy corporation which acted as the repository for the kickback funds which were sent through the mail by check to the dummy corporation and deposited in a secret bank account.

Thus, regarding the alleged defrauding of Pan Am, the Government is left with a "but for" argument: but for the sales, by TABULATING to Pan Am, which were paid for by the mailing of checks by Pan Am to TABULATING, there would be no fraud. Such a test in attempting to establish mail fraud would not suffice and, in fact, has been explicitly rejected. United States v. Staszczuk, 502 F.2d 875, 881 (7th Cir. 1974). In the United States v. Tarnopol, 76-1542, 1543, 1544, 1545 3rd Circuit, May 5, 1977, the Government contended that over Three Hundred Fifty Thousand (\$350,000.00) Dollars worth of sales of musical records had not been recorded on the corporation's books, that the proceeds of those sales in the form of cash were retained by the defendants and used to create a fund out of which improper payments were made to disc jockeys and program directors of radio stations to secure favored treatment. That the transactions were used to defraud the United States by impeding the functions of the Internal Revenue Service and to defraud artists, songwriters and publishers to whom the corporations were obligated to pay royal-

ties based on sales as well as radio stations and the listening public who were deprived of the honest services of the radio station's employees. In Tarnopol, a shipping document known as a "packing slip" accompanied each shipment with copies thereof being mailed to certain of the principals involved in the transactions. The Court, in reversing the Mail Fraud conviction, stated at page 11:

"We do not believe that there is a valid distinction to be drawn between those routine mailings which are required by law and those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or convenient procedure of a legitimate business enterprise. In either case, the mailings themselves are not sufficiently closely related to the fraudulent scheme to support a mail fraud prosecution even though securing the funds received through some of them is the object of the scheme to defraud, as is true in the Parr and Beall cases. . .

The Government contends that the appellant's fraudulent scheme began with the sale of records and, therefore, included the receipt of the packing slips. The Government's theory is that but for the sale there would have been no failure to enter the sale in the books and, thus, no fraud. This argument, however, merely points out the link between the sales, the mailings and the fraud, but does not address the crucial question whether the packing slips were received for the purpose of executing the scheme to defraud. See United States v. Staszczuk, 502 F.2d 875, 881 (7th Cir. 1974), modified in banc on other grounds 517 F.2d 53, Cert. denied, 423 U.S. 837 (1975)."

- C. AN ANALYSIS OF THE APPLICABLE LEGAL PRINCIPLES DEMONSTRATES THAT THE MAILING OF INVOICES, PURCHASE ORDERS OR CHECKS ARE INSUFFICIENT TO SUSTAIN THE CONVICTION ON MAIL FRAUD.

Aside from argument that the Trial Record is absent

any evidence concerning specific purchase orders or invoices or that the sole mailing is represented by the Government's Exhibit "7", the checks in payment for goods sold and delivered, it must be emphasized that like all criminal statutes, "statutes such as Section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress". United States v. Kelem, 416 F.2d 346, 347, (9th Cir. 1969), Cert. denied, 397 U.S. 952 (1970). To support Federal Criminal Jurisdiction, the mailing must be, in the words of the statute, "for the purpose of executing such scheme or artifice." Courts have used a variety of expressions in describing the necessary connection between the fraud and the use of mail, such as "significantly related to those operative facts making the fraud possible", Adams v. United States, 312 F.2d 137 (5th Cir. 1963) and "real and proximate, not nearly abstract or remote." United States v. Brickey, 296 F.Supp. 742, 748 (E.D.Ar.). In any given case, however, the sufficiency of the connection should be determined in the practical manner by which law determines similar issues of causation and remoteness. The experience of courts confronted with factual situations similar to the instant case provide insight into the practical application of the above-stated general principles.

The legal principles discussed in Parr v. United States, 363 U.S. 379 (1960) are applicable in the instant case.

In Parr, members of the Board of Trustees of a Texas County school district were indicted for mail fraud on the theory that, over a period of years, illegal tax assessments and notices of tax assessment hearings, which the Board mailed in the course of its business caused taxpayers to mail tax monies to the Board, which were then converted to the personal use of the Board members. Specifically, the Court noted that the mailings were, in and of themselves, not fraudulent, since they contained no false statements and the mailings were legally compelled. The Court reasoned that the mailings were outside the control of the defendants and did not constitute "unlawful steps in the plot".

In the case sub judice as in Parr, the mailings from Pan American to TABULATING or from TABULATING to Pan American, if proven, were, in and of themselves, innocent acts outside the control of the Appellant. Pan American had the practice, apparently, of mailing checks in payment for goods sold and delivered and had set up its invoicing and purchase order systems well in advance of the alleged scheme and maintained this practice, without deviation or instructions, in all of its business transactions. Also, as in Parr, the Pan Am-TABULATING mailings were not secretive, but openly executed in accordance with legitimate business practices. Such mailings were completely unlike the mailings of checks in Brycza (supra). Cases subsequent to Parr have held that where inno-

cent mailings were used to generate cash, the mailings were too remote to constitute mail fraud violations. United States v. Maze, 414 U.S. 395 (1974); Kann v. United States, 323 U.S. 88 (1944). See, also: United States v. Staszczuk, (supra) and United States v. Brickey, (supra).

In Maze, (supra), the Government had clearly established that a fraud existed and that the mails had been used to complete the fraudulent transaction. This, however, was not enough. As the Government itself has noted in the past, the Court, in Maze, ruled that the mail fraud statute must be strictly construed. Basing its decision upon the grounds that a broad interpretation of the mail fraud statute would constitute an unwarranted expansion of federal jurisdiction, the Supreme Court stated:

"Congress could have drafted the mail fraud statute so as to require only that the mails be in fact, used as a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be 'for the purpose of executing such scheme or artifice. . .'" United States v. Maze, 414 U.S. at 405.

Mr. Justice Renquist, speaking for the Court, stated:

"If the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this court." 414 U.S. at 405.

In Tarnopol, the Court re-emphasized the guidelines which must be used to determine if there has been a violation of the statute, stating:

"And it is not every use of the mails in connection with a scheme to defraud which the statute stamps as criminal, but only those which are made for the purpose of executing the fraudulent scheme. As the Supreme Court has said in Kann v. United States, 323 U.S. 88, 95 (1944):

'The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law'. . .

Moreover, as the Court of Appeals for the 5th Circuit said in United States v. LaFerriere, 546 F.2d 182, 187 (5th Cir. 1977):

'The close relation of the mailings to the scheme does not turn on time or space, but on the dependence in some way of the completion of the scheme or the prevention of its detection on the mailings in question'. . .

Nor are routine mailings required by law which are themselves intrinsically innocent even though they take place during the course of carrying out a fraudulent scheme, the objective of which is the embezzlement of funds received in response to the mailings. Parr v. United States, 363 U.S. 370, (1960). . .

We conclude that these mailings did not qualify as mailings made for the purpose of executing the scheme to defraud alleged in the indictment. They were, as we have seen routine mailings, which, although taking place during the conduct of the over-all scheme to defraud, were too remote from it to be regarded as furthering it. They served the legitimate and, indeed, necessary business purposes of informing Brunswick and Dakar of the fact that that shipment of records had been made by Columbia directly to their customers."

In summary, the Mail Fraud allegations alleged in Count One, and as we shall see, the Wire Fraud allegations in Count Two must fall. The mailings in this case bore no legal relation to, and were remote from, the basis of the frauds alleged. It was plain and legal error for the court below to submit the Mail and Wire Fraud allegations to the jury.

The allegations in Count Two of the indictment relate to alleged violation of the Wire Fraud laws 18 U.S.C. §§1843 and 2. The indictment as has been noted previously herein, incorporates by reference the allegations of Count One of the indictment differing only in the contention that the fraud perpetrated was by means of communications in interstate commerce, i.e. telephone calls. The Record itself reveals no distinguishing facts concerning Count Two of the indictment save the alleged use of the telephone to perpetrate the fraud.

Principal references to telephone conversations are listed below. For the most part they reveal no connection with interstate conversation as required by the statute and hardly may be characterized as incriminating:

Page 92: "A. On receipt of the requisition that we have previously discussed in this particular instance, Mr. DiNapoli indicated the application to himself and indicated the date of his receipt for action.

The second step, or the second phase, was the record of telephone quotation sheets, record of telephone quotation sheets which is a history of the vendor's companies who was solicited and the prices that were received verbally from

those respective companies for the item to be purchased."

(Testimony of O'Toole)

Page 125: "Q. The black ink here which is written out, 'confirming order placed by telephone on 6/21/76 to your Mr. Barney.' What does that language mean?

A. That means that the commitment for purchase was made based on a telephone conversation as opposed to the more routine method of preparing the purchase order and mailing it to the vendor."

Page 126: "Q. You don't know, Sir, whether or not from a reading of this document the order was placed by Mr. Hasenstab?

A. No, I don't, Sir."

Page 172: "Q. The papers also contain a record of telephone quotations or quotation; isn't that right?

A. That is correct.

Q. And that record of telephone quotation is in Mr. Cordano's handwriting, is that correct?

A. That is correct.

Q. He indicates that a bid was received from -- or a price was received from Tab Forms, from Mr. Barney; is that correct?

A. That is what it states here, Yes.

Q. Yes also, he writes the words 'Sole Source;' is that correct?

A. That is what it states, yes.

Q. And Mr. Cordano was one of the buyers in this unit 5; isn't that true?

A. That is correct."

(Testimony of O'Toole)

Page 200: "Q. So that Mr. DiNapoli according to the form, when this order came in referred the handling of this matter to himself and the purchasing order itself indicates that he made the order by telephone call, is that right?

A. That's correct."

(Testimony of O'Toole)

Page 223: "Q. And the prices indicated in the same colored ink in what is apparently the same handwriting as the person who wrote 65 and W. Hasenstab, isn't that right?

A. That's right.

Q. And as a matter of fact, there is a line here 'Confirming order placed by telephone to your Mr. Barney.' Telephone and Mr. Barney is written in ink next to the words 'Confirming order placed.'?"

A. That's correct.

Q. And it would appear to be the same handwriting as that of No. 65, isn't that true?

A. It would appear to be."

(Testimony of O'Toole explaining a buyer identification number 65)

. . . . Page 223 (continued) and 224:

"Q. Tell me as manager of this department, on this requisition form, where the expression is 'Confirming order placed by telephone to your Mr. Barney.' the telephone that is referred to, doesn't that mean a telephone call has been made from the user department at some time asking that these goods be ordered?

A. I can't --

Page 224 (continued):

Q. You can't tell?

A. That is not correct -- you indicated by the user department. It can be construed and in most cases it is suggested that it is placed by the buyer.

Q. When you say placed by the buyer, you mean the writing is placed by the buyer on the requisition or do you mean the order is placed by the buyer?

THE COURT: Or do you mean the telephone call is made by the buyer?

THE WITNESS: Well, Your Honor, there is no way for me to answer the question. I don't know what transpired at the time. As a matter of fact, if I can state, those orders are not within the realm of my responsibility. It was prior to. It is 1972, and I am not familiar with the working environment or the personnel or who 65 was."

(Testimony of O'Toole)

Page 226: "Q. To whose knowledge is this information that the order has been OK'd by telephone, to whose knowledge is that supposed to be called, whose attention?

A. That particular statement, that particular requisition form is singular in its application. It is used within the confines of the purchasing department. . ."

(Testimony of O'Toole)

Page 301: "Q. If an order, Sir, indicates on the face that a telephone order was placed by -- withdrawn. Do you have any recollection, Sir, of placing orders by telephone yourself to Tabulating Stock Forms?

A. Yes, sometimes I have.

Q. Do you have any recollection of directly receiving quotations from Tabulating Stock Forms?

A. Yes, sometimes I have.

Q. Do you have any recollection of directly receiving quotations from Tabulating Stock Forms?

A. Over the phone.

Q. Where would that order over the phone come from?

A. Where would the order come from?

Q. Where would the order come from, I'm sorry.

A. From Mr. Barney.

Q. He would call you, speak to you, give you a price?

A. I would call him, tell him the form I was referring to, being that he was familiar with them previous to that, and also spoke to other vendors that had quoted on the same form."

(Testimony of DiNapoli)

Page 330: "Q. Other than seeing him, would you have telephone contact with him?

A. Yes."

(Testimony of Barney)

Page 332: "Q. What would you do?

A. I would usually know what forms he was going to discuss and the quantities from a previous phone call, and I would have the prices that he wanted to quote, and he would give me direction on them.

Q. What do you mean he would 'give you direction'?

A. He would always let you know which ones you were going to get or if you had to go up a little bit and say 'you are not going to get this one,' or 'you have to come down a little bit.'

Q. During these meetings did you ever learn the price of any of your competitors?

A. Not really." (Underlining ours)

(Testimony of Barney)

Page 348 and 349:

"Q. Did you ever speak with Mr. Hasenstab at Rockleigh, New Jersey?

A. Well, from there, yes.

Q. Over the telephone or in person?

A. Over the phone, I never met him there, although he did go there occasionally.

Q. Where was he when you would speak to him on the phone from Rockleigh?

A. At JFK.

Q. Did you ever have occasion to telephone Rockleigh, New Jersey, from 115 Broadway?

A. Yes.

Q. How often would you say you did that?

A. Three, four times a week.

Q. Who would you speak with?

A. Sol Welger."

(Testimony of Barney)

Page 440: "Q. When you say one of those things were cleared and you remember the call, was this a call by Mr. D'Angelo or Mr. Fury to Hasenstab to clear it or was it a call by Welger to clear it, or was it a call by you to clear it?

A. It was Mr. Welger to Hasenstab."

Although the quotations set forth above from the trial transcript may not be exclusive and complete, they re-

present, at the very least, the character of the testimony relating to telephone calls alleged to have been used or made by varying parties in connection with either their duties or relationship with Pan American. It is quite obvious that none of the telephone calls cited, and none of the telephone calls otherwise cited in the trial transcript, reach the dignity of having been placed for the purpose of executing a fraudulent scheme. For this reason, Count Two of the indictment must fall.

Significantly, the emphasis upon the element of Mail Fraud and the type of mailing required to sustain such, as well as the Court's position in respect to Count Two Wire Fraud were commented upon on page 503 of the trial record:

"MR. FRIEDMAN: Yes, Your Honor. If Your Honor please, I move to dismiss on the grounds that the Government has not made out a prima facie case on the facts and the law; specifying the following as the basis for my motion:

As I understand it, the Government takes the position that the mailing of the documents in the nature of invoices and the payment of goods constitutes use of the mails as to fall within statute.

THE COURT: The court takes the same position, so I can put your mind at ease as to the law as I see it. . . ."

And on page 588:

"THE COURT: I gather the Government wants to go forward with both the mail fraud, which I think is amply supported and wire fraud, which is far less substantially supported. I do believe that the quantity of the Government's proof is greater by far on the mail fraud than the wire fraud. . . ."

Defendant submits that it was plain error to submit
Count Two to the jury.

TRANSACTION ANALYSIS

THIS EXHIBIT SUMMARIZES FROM THE TESTIMONY OF MR. O'TOOLE THE GOVERNMENT WITNESS THE PURCHASES BY PAN AMERICAN FROM TABULATING FORMS INC. FOR THE YEARS SUBJECT OF THE INDICTMENT.

A. In addition to Government's Exhibit 2 the balance of apparently all of the purchases by Pan American from Tabulating Forms are represented by defendants' Exhibits A-J.

B. To the extent ascertainable from the trial transcript, each purchase or alphabetical category has been analyzed with reference to:

- (1) Its identification by Exhibit number.
- (2) The relevant papers in which the Exhibits are described in the trial transcript.
- (3) The person to whom the user Requisition was referred Unit 5, of Pan American, the Purchasing Department.
- (4) The "buyer" of the goods from Pan Am.
- (5) The identification of the person who secured the pricing in the Pan American Purchasing Department Unit 5.
- (6) The identification of the person reviewing the Requisition or purchase order.
- (7) The identification of the person selecting Tabulating as the designated vendor to Pan American.

C. All of the Exhibits will be produced for the court's inspection upon argument of the Appeal.

D. Government's Exhibit 2 is a typical set of documents consisting of a Requisition form from the User Department of

Pan American, directed to Unit 5, of Pan American, the Purchasing Department, together with related copies of the purchase order. Pertinent testimony from the trial transcript shows (90, 93, 119) that the Requisition was referred to the buyer Mr. Nick DiNapoli, who assigned the fulfillment of that order to himself (167), that he secured the pricing quotations (165) and acted as the buyer making the selection of Tabulating Forms as the designated vendor. (167). The document was reviewed by Mr. Hasenstab, the Appellant.

E. The Exhibits series "A" are broken down into seven transactions. As with the subsequent series through defendant's Exhibit J, they represent the Requisition purchase order form and price quotation sheets for substantially all of Pan Am's purchasing from Tabulating, and were obtained by Government Subpoena served upon Pan American. A reading of the record reveals (147, 149, 151, 170, 174, 176, 178, 197, 181-183), that substantially all of the Requisitions were referred to Mr. Nick DiNapoli, the Pan Am buyer. That two of the Requisitions were referred to Mr. Cordano, a Pan Am buyer - that ultimately acting as buyer, securing price quotations and designating Tabulating as the vendor were in addition to Mr. DiNapoli and Mr. Cordano (171-172), buyers McAdams, Dickenson (181) and J. Furey. (182-183) Defendant-Appellant Hasenstab is mentioned as having "reviewed" one order. (171)

F. The "B" series in evidence (185, 186, 187) indicates either handling of this series of Requisitions and purchase orders by Mr. DiNapoli or in some instances by persons whose identity could not be elicited in the interrogation of Mr. O'Toole. It was noted

in this series of documents that Mr. Hasenstab, the Appellant, had not acted as "buyer" but that he was designated as the person to whom samples should be sent. (187)

G. The "C" series in evidence (189-190) indicates that all five such transactions were under the control of Mr. DiNapoli.

H. The "D" series in evidence (190-193) were categorized by Mr. O'Toole, the Manager, as having been referred to and put under the control of buyers, McAdams and DiNapoli with the exception of one transaction where the goods were ordered by Appellant. (192)

I. The "E" series of documents in evidence (192-193) approximately eight in number, were testified to as having been under the control of buyer Callahan in six instances and by buyer DiNapoli in the remaining two instances.

J. The "F" series of documents in evidence (194-203) which were not separately marked, totalled approximately thirty-six transactions for the given period of time concerned. They were divided as to the buyer control approximately as follows:

BUYER	McAdams	- 2 at pages 195, 196.
	Mardosa	- 2 at pages 195, 196.
	Callahan	- 25 at pages 195, 196, 197, 198, 201-203.
	DiNapoli	- 7 at pages 229.

K. The "G" series of documents in evidence total approximately ten. (204-206) All were testified to by Mr. O'Toole as having been

under the control of buyer DiNapoli. Appellant was shown to have reviewed one order.

I. The "H" series of documents similarly totals approximately ten. (221-230) And were divided as to responsibility as follows:

BUYER	Hasenstab	-	3 (221, 223, 228, 229)
	Mc Adams	-	1 (229)
	DiNapoli	-	6 (229, 230)

J. The "I" series in evidence represents a blanket purchase order with TABULATING STOCK FORMS INC., placed by PAN AMERICAN on 5/8/75 (234) which contained the legend:

"Only person authorized to activate your services are S. Welger or his designee." (243)

together with one transaction handled by buyer, Mardosa, containing the same restrictive legend. (248) And, a third order containing a like restriction authorizing control to activate the order solely in the hands of S. Welger. (249)

K. The "J" series in evidence was an order for the user of the department of PAN AMERICAN in Rockleigh, New Jersey (270) personally handled by the buyer, Mr. DiNapoli. (277)

POINT II

THE CONSPIRACY COUNT MUST FAIL IF
EITHER THE MAIL FRAUD OR WIRE FRAUD
COUNTS ARE REVERSED.

Appellant submits that the conspiracy, Count Three, was submitted to the Jury on two theories. The first theory related to conspiracy to commit a violation of the mail fraud statute and the second theory to commit a violation of the wire fraud statute. The Jury, of course, returned a general verdict of guilty, making it impossible to determine whether the Jury reached its decision on a particular specified count. Therefore, the appellant urges that if either the conviction for mail fraud or wire fraud be vacated, that, in accordance with U.S. v. Dansker, 537 F.2d 40, 51, (3rd Cir. June 2, 1976), the conviction be vacated on the conspiracy count. In that case, the Court reasoned:

"...the District Court, however, instructed the Jury that if it found that the alleged conspiracy had as its illegal objective either the bribe of Ross or Serota, it could convict the defendants. The conspiracy count was thus submitted to the Jury on alternative theories, only one of which, in retrospect, was sufficient to justify a conviction. The Jury then rendered a general verdict of guilty on Count One making it impossible to identify the grounds on which its decision was based."
537 F.2d 40, 51 (3rd Cir. 1976) (cert. denied)
_____ U.S. _____ (1977).

POINT III

THE COURT'S CHARGE CONTAINED REVERSIBLE ERROR

A. USE OF THE MAILS

In defining the elements essential to an understanding of the law to be applied in the case, the Court, after reading the indictment commenced immediately to pollute the entire charge insofar as it related to the use of the mail requirement of the statute. The Court set forth three (3) elements upon which the Government was to bear the burden of proof:

- First - Proof of a scheme to defraud.
- Second - Defendant's knowledge or intent.
- Third - "That the scheme or artifice to defraud involved the use of the mails under Count I, of the use of interstate wire facilities -- in this case, the telephone -- under Count II."
(emphasis ours) (650)

Clearly, the definition under the third element was erroneous, went right to the heart of the case, and set up the trial court's own erroneous interpretation of the law. The statutory requirement and language is quite clear -- it is not that use of the mails must be "involved", but rather that the use of the mails must be "for the purpose of executing" the scheme.

Appearing some eight (8) pages later in the trial transcript (658), the Court attempted a definition in rather a rambling fashion that did not at all define those words of the statute essential to a proper charge. That is, it did not define the language "for the purpose of executing the scheme".

The Jury, having only shortly before this point, been instructed by the Court that the Government's obligation was to prove that use of the mail was "involved" clearly must have been mindful that such was the standard to be applied. Furthermore, that "corrective" portion of the Court's charge as it appears on page 658 of the Trial Record, came immediately before the Court's Charge on conspiracy in which the Court proceeded to give its opinion of the case. On page 668 of the Trial Record, the Court expressed its opinion of the case when it said in reference to the conspiracy charge,

"The old adage 'actions speak louder than words' is applicable here."

Exception to the "involvement" portion of the Charge was duly noted. (684) Counsel also excepted to the Court's expression of its opinion on the facts of the case by its reference to

"The old adage 'actions speak louder than words' is applicable here."

This Circuit has held that

"If justice is to be done in accordance with the rule of law, it is of paramount importance that the Court's instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the Government beyond a reasonable doubt, . . ." United States v. Clarke, 475 F.2d 240.

That the standard of proof imposed upon the prosecution was reduced and diluted by the Court in respect to Counts One and Two cannot be doubted. The use of the standard "use of the mails must be involved" taken on a whole with the language of the Charge falls squarely within the Clarke (supra) prohibitions.

B. THE "ONE SUCH MAILING"

Coupled with the foregoing, intermingled inseparably with it, is the language of the Charge commencing on page 658 of the Record, wherein the Court instructed the Jury as follows:

"I will tell you in that connection that it is not necessary for the Government to have proved that Mr. Hasenstab contemplated the use of the mails or that particular use of the mails is an essential element in a scheme. At the same time, it would not be sufficient if the mails merely came to be used incidentally or co-incidentally as a result of the fraudulent scheme. (emphasis ours)

I instruct you that to satisfy this essential element, the proof must show that the use of the mails was intended in the sense that it was reasonably foreseeable as an incident that would occur in furtherance of execution or continuation of the scheme to defraud. (emphasis ours)

I have told you that you do not have to find this purpose that Mr. Hasenstab himself actually mailed an item to constitute this aspect of the proof. You must find, however, before you may convict the defendant, that if he did not personally participate in the use of the mails, he, at least in the sense of the indictment and statute, caused the mails to be used. (emphasis ours)

In this sense, one can cause the use of the mails if he either knows that the use of the mails will follow from the working out of the scheme in the ordinary course of business, or if such use of that mailing is reasonably foreseeable to the defendant as part of the evidence covered by the continuation and elaboration of the fraudulent scheme." (emphasis ours)

A careful reading of the quoted portion of the Charge, set forth immediately above, makes clear that following the Court's statement that it would not be sufficient if the mails came to be used incidentally or co-incidentally, the Court then immediately indicated that it would be sufficient if the proof

showed that it was reasonably foreseeable as an incident that would occur. How the Jury could have been rationally expected to distinguish the difference between

"It would not be sufficient if the mail merely came to be used incidentally or co-incidentally"

with that part of the instruction which permitted a verdict of guilt if the proof showed that use of the mails was

"reasonably foreseeable as an incident" (emphasis ours) is not at all clear. Such instruction was confusing, at least.

Exactly what the Court meant in respect to that portion of the Charge set forth above when it stated

"he, at least in the sense of the indictment and statute, caused the mails to be used" (emphasis ours)

one cannot readily determine. It is counsel's understanding that it is for the Court to define the "sense of the indictment and statute" as a guide for the Jury rather than leaving such important matter undefined.

Similarly, what the Court's intention was in respect to that portion of the Charge outlined in respect to "foreseeable as part of the evidence" is unclear.

"...or if such use of that mailing is reasonably foreseeable to the defendant as part of the evidence covered by the continuation and elaboration of the fraudulent scheme." (emphasis ours)

Shortly following the portion of the Charge set forth above, the Court continued on pages 659 and 660 to instruct the Jury as follows:

"The Government in this connection charges that Mr. Hasenstab caused mailings by Pan American and by George Barney that are claimed to satisfy this third essential element under Count I. Specifically, the Government contends that the invoices mailed to Pan American by Mr. Barney constitutes such mailings; and also that the mailing of the checks by Pan American as payment for these invoices were such mailings. (emphasis ours)

I instruct you that you must find at least one such mailing under the instructions I have just given you before you may convict on Count I. (emphasis ours)

Similar principles apply, . . . to the wire fraud charge . . .

Again, the defendant need not, himself, have directly participated in the communication either as the caller or the person receiving the call. But he must, at least, either have known that the use of the wire communications would follow in the ordinary course of business, or that this was reasonably foreseeable in the continuation and carrying out of the complicated steps of the allegedly fraudulent scheme." (emphasis ours)

Such Charge was devastating to the defendant and constituted plain error. The complained of instructions obviously mandated the Jury to convict on the mail and wire fraud counts by equating the government's "contention" with proof of guilt. The Court by advising the Jury that if it found one such mailing of the type claimed by the Government to be violative of the law, that "you may convict" directed the verdict of the Jury, diluted the standard proof applicable to the case at bar and took the question of fact from the Jury's deliberation. It equated the mailing with guilt. This portion of the Charge was excepted to as appears on page 688 of the Trial Record.

In reversing the conviction in United States v. Clarke

(supra) the Court also stated:

"Absent clarification this would have required a new trial, since the effect was almost surely to confuse or to leave an erroneous impression in the minds of the Jury . . . However, the key terms remained undefined. Viewed from the standpoint of fairness to the accused, there is a strong probability that the Court's references to the alleged offenses 'taken as a whole (were) such as to confuse or leave an erroneous impression in the minds of the Jurors' Perez v. United States, 297 F.2d 12, 16 (5th Cir. 1961).

Under the circumstances, we cannot ascertain and should not speculate as to the basis upon which the Jury reached its conclusion of guilt. See Smith v. United States, 230 F.2d 935, 939 (6th Cir. 1956); Patterson v. United States, 183 F.2d 687, 690 (5th Cir. 1950). . . . The Supreme Court observed in Bollenbach v. United States, 325 U.S. 607, 612, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946), a case considerably more complex than the case here, that '(D)ischarge of the Jury's responsibility for drawing appropriate conclusions from the testimony depended upon discharge of the Judge's responsibility to give the Jury the required guidance by a lucid statement of the relevant legal criteria."

The latter portion of the Charge quoted above, wherein the Court stated:

"that he must, at least, either have known that the use of the wire communications would follow in the ordinary course of business, or that this was reasonably foreseeable in the continuation and carrying out of the complicated steps of the allegedly fraudulent scheme."

set forth for the Jury an additional original standard by the Trial Court not having basis in law. Nowhere is there provided in the statute or decisions an authority for conviction by a Jury based upon the "knowledge of the defendant that the use

of wire communications would follow in the ordinary course of business". This portion of the Charge was as violative as the others and mandates reversal in accordance with the authorities cited above.

C. THE CONSPIRACY CHARGE - "ACTIONS SPEAK LOUDER THAN WORDS"

Following the Court's Charge on mail and wire fraud and shortly after its instructions as to circumstantial evidence, the Court undertook to explain the law of conspiracy. As previously set forth, the Court, in referring to the case at bar, stated at page 668 of the Trial Record in defining conspiracy.

"The old adage 'actions speak louder than words' is applicable here".

A hardly more egregious statement could have been designed. Its effect was to characterize the Court's opinion of the case. The Jury had only to remember, in the privacy of its deliberation, the clear admonition of the Court

"The old adage 'actions speak louder than words' is applicable here",

and who would argue that the opinion of the presiding Justice at trial is not entitled to some weight. Exception was taken by defendant. (689 - 690)

In United States v. Musgrave, 444 F.2d 755 (1971) the Fifth Circuit Court of Appeals reviewed the power of a Judge to comment upon the evidence cautioning that "the effect of these comments was

"to suggest Musgrave's guilt by association with Womack. Courts must protect against the human tendency to conclude that people, like 'birds,... are frequently judged by the company that they keep ... Roe v. United States, 5th Cir. 1963, 316 F.2d 617, 623. Equally important, the Trial Judge must be careful to maintain an at-

titute of impartiality and avoid giving the Jury any impression that he believes the defendant is guilty. Baker v. United States, 5th Cir. 1966, 357 F.2d 11, 14. In the instant case, the Judge's characterization 'of the accused was, of a sort, most likely to remain firmly lodged in the memory of the Jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence'. . . These comments constituted plain error . . . " Musgrave (supra)

In the case sub judice there was no instruction by the Court to the effect that the Jury was not bound by the Judge's comments. Quoting from Bursten v. United States, 5th Cir. 1968, 395 F.2d 976, 982-983, the Musgrave Court stated:

"It is well known, as a matter of judicial notice, that juries are highly sensitive to every utterance by the Trial Judge, the Trial Arbiter, and that some comments may be so highly prejudicial, that even a strong admonition by the Judge to the Jury that they are not bound by the Judge's views, will not cure the error . . . A Trial Judge must strive for total neutrality and complete circumspection in the eyes and minds of the Jury."

The "spillover" effect of this portion of the Judge's Charge to the First and Second Counts of the indictment cannot be overlooked.

D. THE "DUTY TO CONVICT"

During the Course of the Charge to the Jury, as it referred to the conspiracy, the Court, over prior objection, set forth its view that, under certain circumstances, the Jury had a duty to convict. The exact Charge appearing on page 674 of the Trial Record appears as follows:

"Once again, as I have previously said, it is not necessary that the Government prove every aspect of the schemes to defraud as they are described in the indictment or the existence of more than one scheme as to any one count, so long as it proves

any of the schemes charged in the count to comport with the legal requirements I have already instructed you about. It would still be your duty to convict (emphasis ours) even if you found that the Government had proven only one of the pretenses, representations, or concealments over a material fact charged in the indictment, and that each of the other essential elements that I have previously described to you has been proven.

As in much of what you, the Jury, are required to do, (emphasis ours) this is nothing more than using common sense in applying the legal principles I am giving you to the facts as you find them."

We hold this portion of the Charge to be plain error. There is no authority for the Court to direct a verdict. United States v. Hayward, 420 F.2d 142. We know of no duty on the part of a Jury to convict. We know of no law holding that an instruction to the Jury that they "must" convict is proper. When the Trial Judge, even though not directing a verdict of Guilty, in form, causes to be such the substantive effect of the instruction given, such instruction is reversible.

"The rule against directed verdicts of guilt includes, perforce, situations in which the Judge's instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the Jury finds one fact to be true. As the Supreme Court said in Bollenbach v. United States, 326 U.S. 607, 614, 66 S.Ct. 402, 406, 90 L.Ed. 350 (1946) 'the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a Jury according to the procedure and standards appropriate for criminal trial in Federal Court . . .'"

E. THE LUNCHEON

Prior to the time that summations were taken, the Court instructed the Jury as to the procedure that would be followed in respect to the concluding aspects of the case. As appears on

page 602 of the Trial Record, the Court instructed the Jury as to the time schedule to be employed and then indicated that

"You will either be asked to deliberate briefly and then be sent out to lunch -- the Government will be paying the luncheon check -- or, if we run later, we will be going directly through lunch." (emphasis ours)

It seems to counsel that it was prejudicially unnecessary to advise the Jury in this criminal case that the Government was going to pay for its lunch. While one may not know the extent to which such largess would affect the deliberation process of any one juror, it is not counsel's function to speculate on the issue. Clearly, the imparting to the Jury that it had the Government to thank for paying for the lunch did not enhance the defendant's opportunity for a fair deliberation process. If there be any question as to the logic employed in this point of the argument, one might consider what the attitude of the Government would have been if the Judge had stated to the Jury,

"You are now going to lunch. The defendant will pick up your luncheon check."

Approached, singularly, each of the subdivisions outlined in this Point III of Appellant's Brief might possibly be severed and dissected in such fashion as to permit the reaching of differing conclusions by some as to the claimed errors. Cumulatively, however, we believe that the errors presented are sufficient to constitute reversible error.

POINT IV

THE EVIDENTIARY RULINGS

Mr. Barney, the Government's witness, the co-conspirator, during his direct examination, was subject to a line of questioning by the Government which was designed, it was claimed, to "take the wind out of the defendant's sails". The line of questioning started as is indicated on Page 336 of the Trial Record in reference to which the prosecutor contended (338):

"First of all, we are entitled to bring out up front criminal acts which may have been committed by Mr. Barney in addition to those which he is testifying about the instant indictment for purposes of impeachment..."

The Court indicated its view of this line of questioning, over the defendant's objection by stating (339):

"I think Mr. Kingham's point is well taken that the Government has the right to bring it out front. . . I think Mr. Kingham expected the answer which you gave which I expected as well and it leads me to the conclusion that it does fall within the bounds of what the Federal Rules of Evidence have indicated is relevant. So I will permit you to inquire as to what he did."

Following the ruling, the Government proceeded to bring out on its direct examination of Barney, acts of Mr. Barney whereby he testified to a corrupt transaction with a Mr. O'Brien.

The evidence brought out in reference to Mr. O'Brien was that out of the presence of the defendant, a corrupt agreement was entered into between Barney and Mr. O'Brien to pay off O'Brien in order for him not to complain about the fact that his company was not getting a certain quantity of business from Pan American.

Thereafter, under the same ruling, although an objection was sustained, (349), the Government was permitted to bring into evidence testimony that the witness, Barney, had been undergoing an IRS tax audit and required substantiation for his claimed deductions. Testimony was elicited that HASENSTAB, the defendant, suggested to the witness, Barney, that HASENSTAB's wife could be added to Barney's payroll and that HASENSTAB had sent to Barney blank receipts from a restaurant, the Chelsea, which Barney could fill out for the purpose of substantiating his tax deductions. While, counsel may have pressed this latter evidentiary objection more vigorously, the ruling of the Court had plainly put the handwriting on the wall starting with the testimony of Mr. O'Brien. Thereafter, the Government brought out a series of pay-offs, under the effect of the prior ruling of the Court, all of which became, devastating to the defendant HASENSTAB. This material, introduced by the Government, was not for the purpose of "taking the wind out of the defendant's sails" but rather for the clear purpose of prejudicing the defendant. The Chelsea incident, of course, was not related to the trial, and the testimony relating to the Hartz Mountain pay-off of \$50,000, the Chemical Bank pay-off of \$10,000, the Camelot Business Forms pay-off of \$25,000, the Applied Devices pay-off of \$12,000, the HIS pay-off of \$3,000, the pay off of Salomon Brothers of \$400, and the pay-off of O'Brien at Moore Business Forms of \$3,000 amongst the other pay-offs including \$5,000 to a union leader to end a strike (360) hardly could be character-

ized as not being harmful to the defendant. Since these other pay-offs did not involve defendant, they had no bearing upon the issues which were subsequently submitted to the Jury for its determination. Rule 402 of the Federal Rules of Evidence provides:

"Evidence which is not relevant is not admissible."

Rule 403 of the Federal Rules of Evidence provides:

"Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the Jury, or by considerations of undue delay, waste of time, or need for the presentation of cumulative evidence."

Rule 404 of the Federal Rules of Evidence provides the applicable guidelines in respect to character evidence admissibility. Subdivision (a) states:

"CHARACTER EVIDENCE GENERALLY - evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except . . .

3. Character of witness - evidence of the character of a witness as provided in Rule 607, 608 and 609."

Rule 607 of the Federal Rules provides:

"The credibility of a witness may be attacked by any party, including the party calling him."

Surely, the Government was not seeking by its examination to attack the credibility of its witness, Mr. Barney.

As stated in the 1975 Supplement to "Understanding the New Federal Rules of Evidence", (Rothstein, Law Journal Press) in the commentary relative to Rule 608, the use of the phrase "cross-examination" in subdivision (b) casts doubt on whether this method of impeachment can be used in impeaching one's own witness. In fact, Rule 608 (b) further limits the use of specific instances of misconduct, by requiring that the conduct be "probative of truthfulness or untruthfulness", further, Rule 403 requires that the probative value of any evidence not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the Jury. In HASENSTAB, under the guise of impeaching its own witness, the government misused the Rules of Evidence, when it sought to create an inference before the Jury that Barney's deals with HASENSTAB were as crooked as his other deals. More so, in the case of HASENSTAB's purported assistance with Barney's tax return problem, the more obvious effect of introducing evidence of the misconduct regarding HASENSTAB, who had not taken the witness stand, was to prejudice him. The type of examination conducted in HASENSTAB has been criticized in U.S. v. Karnes, 531 F.2d 214, and U.S. v. Morlang, 531 F.2d 183.

Taken in its true perspective, the effect of the Government's direct-examination of Barney was to paint HASENSTAB guilty by association, and to attack HASENSTAB's character because of his willingness to assist Barney with his tax problems. This was highly improper since the defendant had not taken the

witness stand, and his character was not put in issue. He was made to appear guilty by association with Barney, a man whose self-confessed wrongs left little doubt with the Jury that they were indeed "two peas in a pod." This was plain error requiring reversal.

CONCLUSION

Appellant contends, both on an individual and cumulative basis, that as a matter of law and fact, Counts One, Two and Three of the indictment should be dismissed. Alternatively, defendant contends, upon the dismissal of Count One or Count Two, that the Conspiracy, Count Three, should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF PERSONAL SERVICE

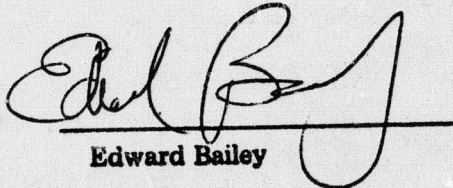
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that
deponent is not a party to the action, is over 18 years of age
and resides at 286 Richmond Avenue, Staten Island, N.Y.
10302. That on the 9 day of Dec. 19 77 at
No. 1 St. Andrews Pl., NY

deponent served the within BRIEF
upon Hon. U.S. Atty., So. Dist. of NY

the Appellee herein, by delivering 3 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
9 day of Dec. 1977


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978